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No. 88-1532

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

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HAZARDOUS WASTE TREATMENT COUNCIL,
*Petitioner,*

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## PETITIONER'S REPLY BRIEF

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*Of Counsel:*
DAVID R. CASE
HAZARDOUS WASTE
TREATMENT COUNCIL
1440 New York Avenue, N.W.
Suite 310
Washington, D.C. 20005
(202) 783-0870

CLIFTON S. ELGARTEN *
RIDGWAY M. HALL, JR.
LUTHER ZEIGLER
CROWELL & MORING
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2505
(202) 624-2500

* *Counsel of Record for the Petitioner*

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The Government's brief in opposition to the petition does not fairly address the decisions below, this Court's decision in *Clarke v. Securities Industry Association*, 479 U.S. 388 (1987), or the Hazardous Waste Treatment Council's interest and its relationship to Congress' goals in enacting RCRA. The fact remains that petitioner's interest—in the development of a "market and increased demand for new, safer treatment and disposal technologies" [1]—is precisely what Congress sought to promote as a means for achieving its ultimate environmental objectives. To reject this interest at the threshold, through the use of a misguided notion of "prudential standing,"

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[1] 130 Cong. Rec. S13818 (Oct. 5, 1984) (Sen. Chafee).

is effectively to determine the outcome of a host of important substantive issues arising from the implementation of a key environmental statute under the guise of a "jurisdictional" determination.

1. The Government's submission studiously avoids any reference whatsoever to the test for "prudential standing" actually applied by the court of appeals. Although nowhere mentioned in the Government's brief, the court below held (in the first of the cases) that a party such as petitioner cannot obtain judicial review under the APA unless he can produce "explicit evidence of congressional intent to benefit" him, or that he is, in the court's judgment, an "unusually suitable champion[] of Congress's ultimate goals." Pet. App. at 11a, 12a, 14a. In the second case, the court of appeals again recited and applied this test, citing none of the alternative formulations offered by the Government. Pet. App. at 34a, 36a. Neither respondent makes any serious attempt to justify the test for standing created and applied by the court below.

Instead, the Government argues that the court's analysis below was an attempt to find an "operational meaning for a test that demands less than a showing of congressional intent to benefit but more than a 'marginal relation[ship]' to the statutory purpose." Opp. at 8. But the analysis described in *Clarke* requires no search for an "operational meaning," let alone an "operational meaning" that contradicts the central premises of the opinion from which it is supposedly drawn. Beginning with the presumption of reviewability under the APA, *Clarke* simply requires a fair appraisal of Congress' purposes in enacting a statute and an assessment of whether the petitioner's interest bears a "plausible relationship" to effectuating the statute's underlying policies. 479 U.S. at 403. In this case, the answer to that question, which the court of appeals declined to address, is "yes."

2. The Government elects to ignore RCRA's legislative history. That history confirms that Congress was concerned about "the development of new treatment capacity," that it intended that "advanced treatment, recycling, incineration and other hazardous waste technologies should replace land disposal," that it wanted to "force the full development of alternative waste management technologies currently in existence," and that it sought to encourage "immediate investment in [the] development of alternative capacity." Pet. at 15 (citations omitted). In sum, petitioner's interest bears far more than a "plausible relationship" to the statutory purposes: its interest is in providing the technology and investing in the treatment capacity that Congress recognized was necessary to achieve its environmental goals.

The Government finds it convenient to characterize that interest as primarily pecuniary. This is beside the point. Treatment Council members have an immediate interest in providing the technology and treatment capacity that Congress wanted provided. That Treatment Council members provide these services ultimately for profit does not change the fact that in providing these services, they are doing what Congress sought to encourage.[2] By setting strict standards, Congress tried to foster development of capacity and technology to meet the Nation's environmental needs. EPA's failure to implement the standards frustrates past investment, and discourages future investment in that technology. It may be that EPA's approach is justifiable on other grounds—that is a matter for the merits—but it is hard to envision a party more concretely injured and better situated than

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[2] The underlying motive for most lawsuits is undoubtedly economic, but that has never been regarded a disqualifying factor. It can hardly be true that if the Treatment Council was composed of not-for-profit corporations, interested in developing technology and treatment capacity on a self-sustaining (but not profitable) basis, it would have a better claim to "standing."

the Treatment Council to support the statutory interest in developing treatment capacity and technology.

3. The Government takes us to task for "confus[ing] two related, but separate issues: reviewability . . . and the standing zone of interests test . . . ." Opp. at 8 n.5. According to the Government, "[t]he general presumption in favor of judicial review of agency action under the Administrative Procedure Act does not concern the issue of who are proper parties to challenge agency action." Opp. at 8 n.5.

The Government is wrong. In *Clarke*, the Court *emphasized* the close relationship between the presumption of reviewability under the APA and the proper application of the zone of interests test. 479 U.S. at 399.[3] This Court's explicit reliance on the presumption of reviewability—and the Court's departure from the near mystical inquiries and tests that had come to characterize the doctrine of "prudential standing"—was hardly inadvertent. *See, e.g., DeLoss v. Dep't of Housing & Urban Development*, 822 F.2d 1460, 1463 & n.3 (8th Cir. 1987). *Clarke* set forth a comprehensible standard, not hostile to judicial review of agency action. Application of that standard is to be guided by the presumption in favor of review and adherence to *congressional* intent. By contrast, the decision below reestablishes prudential standing as a formidable obstacle to review and gives the courts a broad subjective discretion to determine whom *they* regard as "suitable champions" of a given position.

4. The Government's approach confuses the inquiry about "prudential standing" with the inquiry on the merits. Thus, the Government argues that the central focus here is whether " 'petitioner's interests' are more

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[3] In *Clarke*, the Court repeatedly equated the two inquiries. *Id.* at 399, 400 ("The inquiry into reviewability does not end with the 'zone of interest' test.") *See also Block v. Community Nutrition Institute*, 467 U.S. 340, 348-52 (1984).

likely to frustrate than to further statutory objectives," or whether they are "inconsistent with" the statute. Opp. at 10 n.7, 11-12. But there is no inconsistency here. On the face of things, petitioner's interests are entirely consistent with Congress' desire to encourage the growth of hazardous waste treatment capacity. Faced with this apparent congruity of interests between the statute and the Treatment Council, the Government refers to the court of appeals' *hypothesis* about how strict enforcement of certain environmental laws could have the unintended consequence of actually causing more pollution. *See* Pet. App. 12a. The Government and Utility Industry Respondents also spin hypotheses of their own about how petitioner's interest in strict statutory enforcement might ultimately frustrate Congress' desire to provide a healthy environment. Opp. at 11-12; Utility Br. at 10-14.

These matters have no place in the "prudential standing" inquiry. They are for the agency to consider *on the merits* in the first instance, and for the courts to consider only upon review of an agency record. For purposes of "standing," the issue is simply whether the interest being asserted is one that has some "plausible relationship" to *Congress*' purposes, not whether the interest should prevail before the agency, or on review of the agency record in the courts. It fundamentally distorts the process to dismiss those interests, which assuredly were among those with which Congress was concerned, at the threshold.

5. Decisions about standing to review agency rulemaking necessarily have far broader impact than do decisions about standing in private rights cases or in administrative adjudications. A decision like this one, which eliminates one set of interests entirely from all future participation in the process, tends "to allow regulated industries, but not regulatory beneficiaries, to have access to court—thus imposing a perverse set of incen-

tives on administrative actors by inclining them against regulatory implementation when it is legally required." Sunstein, "Standing and the Privatization of Public Law," 88 Colum. L. Rev. 1432, 1463 (1988). Put more simply, the surest way to predetermine the outcome of an administrative dispute is to prohibit one side of the controversy from presenting its views.[4] The test for prudential standing created and applied by the court below—the court of appeals with exclusive jurisdiction over RCRA petitions—is thus not only doctrinally unsound and inconsistent with this Court's cases, but promises to skew dramatically the implementation of a key environmental statute.

## CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

*Of Counsel:*
DAVID R. CASE
HAZARDOUS WASTE
TREATMENT COUNCIL
1440 New York Avenue, N.W.
Suite 310
Washington, D.C. 20005
(202) 783-0870

May 24, 1989

CLIFTON S. ELGARTEN *
RIDGWAY M. HALL, JR.
LUTHER ZEIGLER
CROWELL & MORING
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2505
(202) 624-2500

* *Counsel of Record*
*for the Petitioner*

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[4] The practical effect of the decision below is to bar from the courts those businesses with commercial interests allied with Congress' environmental objectives—businesses concretely injured by agency failures to enforce Congress' statutes—while affording free access to businesses with commercial interests *opposed* to Congress' objectives. *See* Brief for *Amici Curiae* Environmental Defense Fund, National Wildlife Federation tnd Natural Resources Defense Council, at 2-3, 8.